Filed 5/17/10 Emercon Construction v. Butterfield CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

EMERCON CONSTRUCTION, INC., et al.,

Plaintiffs, Cross-defendants, and Respondents,

v.

CARLEEN BUTTERFIELD,

Defendant, Cross-complainant, and Appellant.

G041033

(Super. Ct. No. 06CC08560)

O P I N I O N

Appeal from judgments of the Superior Court of Orange County, David R. Chaffee, Judge. Judgments affirmed; motion for sanctions granted.

Thomas M. Burton for Defendant, Cross-complainant, and Appellant.

LHB Pacific Law Partners, Clarke B. Holland and Matthew F. Batezel for Plaintiff, Cross-defendant, and Respondent State Farm Insurance Company.

Schroeder & Associates, John Schroeder and Dana Leigh Ozols for Plaintiff, Cross-defendant, and Respondent Emercon Construction, Inc.

Carleen Butterfield appeals from judgments in favor of Emercon Construction, Inc. (Emercon) and State Farm General Insurance Company (State Farm), in Emercon's collection action against her and her cross-complaint against Emercon and State Farm for negligence, breach of contract, and insurance bad faith, entered after State Farm obtained a summary judgment and Emercon prevailed at a bench trial. She raises numerous issues, none of which have merit, and we affirm the judgments. We also grant Emercon's motion for monetary sanctions against Butterfield's counsel, Thomas M. Burton, for flagrant violations of court rules in preparing both the appellant's appendix and appellant's brief in this appeal.

I

PLEADINGS AND PROCEDURE

Because this appeal involves two different judgments, in favor of two different parties, obtained by two different means, we begin with only a brief recitation of the facts for context, followed by some procedural background.

Water flooded into the crawlspace under Butterfield's Newport Beach house in January 2004 after a water pipe beneath her house burst. She contacted her insurance company, State Farm. Her homeowner's insurance policy did not provide coverage for damages due to general deterioration of the house (i.e., wear and tear) and did not cover damages from soil subsidence or erosion. A company called Servpro did some initial emergency work, pumping out water, and making initial attempts to dry things out.

In February 2004, Butterfield was given referrals by State Farm for several independent contractors, including Emercon, for structural repairs. Butterfield was repeatedly advised she must hire a contractor and the contractor hired worked for her, not for State Farm. State Farm determined the water pipe broke due to general deterioration (which was not covered by her policy), but most of the structural damage was covered by her policy. Although the broken pipe had been repaired, the crawlspace under her home

continued to have water incursions throughout the relevant time period (over two years) due to rains. The foundation was sinking and there were places where the patio was separating from the house. A structural engineer ascertained there was soil subsidence and undermining of the soil supporting the foundation—some due to the water pipe break and some due to general deterioration.

The structural engineer recommended the floors and subfloors be removed to get the house and soil dry. Butterfield signed a work authorization allowing Emercon to undertake emergency remedial repairs—including removing the floors, placing fans and dehumidifiers to dry out the house, and some mold remediation; and to undertake contents protection work, including cleaning, packing, moving, and storing all of Butterfield's belongings while the structural repair work was being done. Emercon prepared an estimate for permanent structural repairs, which could not be done until foundation work—not covered by the policy—was completed. It gave Butterfield an estimate for the foundation work. The foundation work could not be done until the soil was dry. Butterfield would not authorize Emercon to do the foundation work, and she did not hire any other contractor to do it. She did not hire Emercon to do the structural repairs.

Over the course of two years, State Farm paid Butterfield directly over $225,000, on her claims related to the January 2004 water loss. It paid Butterfield for the initial emergency work based on Emercon's estimates, and Butterfield in turn paid Emercon for the initial emergency work. State Farm paid Butterfield for the contents preservation work based on Emercon's estimates, but Butterfield never paid Emercon for those services. State Farm paid Butterfield for the covered structural repairs to her home, but she never hired anyone to do the work. It paid Butterfield's additional living expenses for almost two years. After those almost two years, with no permanent repairs to the foundation or structure having been made, Butterfield contended her house was a complete loss due to mold growth.

This litigation began with a complaint for damages (on theories of breach of contract and quantum meruit) filed by Emercon against Butterfield in July 2006, seeking to recover the contents preservation costs (i.e., cleaning, packing, moving, and storing all of Butterfield's belongings). Butterfield filed a cross-complaint against Emercon and State Farm.[1] In short, she alleged State Farm hired Emercon to make all repairs and remove her belongings from the house. State Farm and Emercon then failed to repair the damage, exacerbated the damage, and left her house uninhabitable due to ensuing growth of mold and mildew. Although State Farm had paid her over $225,000 on her claims, Butterfield claimed State Farm then "abandoned" her by denying coverage for certain soil subsidence claims and by not paying for damage Emercon had caused. Her cross-complaint alleged causes of action against State Farm for breach of contract and insurance bad faith, and against Emercon for negligence.

With a trial date set for June 2, 2008, on February 15, State Farm filed a motion for summary judgment, which was set for hearing on May 2. Among the grounds asserted by State Farm was that the policy provided for a one-year limitations period on legal actions against it, and Butterfield's cross-complaint was filed more than one year after her claim had been closed. Butterfield's opposition to the summary judgment motions was due April 18, but she did not file opposition. Instead, on April 19, she filed a motion to continue the hearing on the summary judgment motion and requested she be permitted to conduct additional discovery, which motion she set for hearing on May 9 (one week *after* the date set for hearing on the summary judgment motion). On May 1, the court continued hearing on all motions to May 9.

On May 6, Butterfield served State Farm with an opposition to its motion for summary judgment. At the hearing on May 9, the court denied Butterfield's request

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[1] Another cross-defendant, Servpro, was dismissed after its motion to quash service of summons was granted, and that ruling is not challenged by Butterfield on appeal.

to conduct additional discovery and refused to consider her late-filed opposition. The court noted it had continued the hearing on the summary judgment motion only for its convenience—i.e., to hear all motions together—not to "invite" Butterfield to file late opposition. The court found it particularly egregious that Butterfield used the continuance to try and "slip in an opposition" after the date originally set for hearing and long after the deadline for opposition had passed, without offering any excuse for the late filing or seeking leave to file late opposition. The court commented "this appears to be part of a pattern by counsel to disregard the rules."

The court granted State Farm's motion for summary judgment for several reasons including that Butterfield's action was barred by the one-year statute of limitations for filing suit. A judgment in favor of State Farm was entered on July 2, 2008.

A bench trial began on June 2, 2008, on the remaining causes of action between Butterfield and Emercon. The court granted Emercon's motions in limine to preclude Butterfield from introducing evidence on the standard of care for a general contractor because Butterfield had failed to designate an expert on that issue, to exclude any documents not served on Emercon before the discovery cut-off, and during trial it excluded all other expert witnesses called by Butterfield because she failed to respond to Emercon's demand for exchange of expert witness information.

Following a six-day bench trial, the court ruled in Emercon's favor on its complaint and Butterfield's cross-complaint. The trial court's statement of decision was filed on July 16, 2008 (we discuss the court's findings in more detail anon), and Butterfield filed no objections. The court awarded Emercon $76,184.41 on its complaint against Butterfield and judgment for Emercon was entered on July 16, 2008.

II

STATE FARM'S SUMMARY JUDGMENT

Butterfield first attacks the judgment in favor of State Farm. She contends the trial court erred by granting State Farm's motion for summary judgment. We find no error and affirm the judgment.

A. Standard of Review

Our task on appeal in reviewing a summary judgment is to independently review the evidence the parties offered on the motion to determine whether a triable issue of fact existed. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We strictly construe the moving party's papers and liberally construe those of the opposing party. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1506-1507.)

A familiar rule of appellate procedure has been ignored by the appellant in this case: "'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted.) "'[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' [Citations.]" (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

Butterfield elected to use an appellant's appendix on this appeal. (Cal. Rules of Court, rule 8.124(a).) Although she challenges the ruling on State Farm's summary judgment motion, her appellant's appendix omits the documents necessary to review the ruling. She has included only the documents *she* filed (i.e., her motion to continue the hearing on the summary judgment motion and her late-filed opposition that the trial court refused to consider), and has omitted State Farm's moving papers (i.e., the motion for summary judgment and separate statement of material facts and evidence).

Butterfield's failure to provide an adequate record for review is alone grounds for affirming the judgment in favor of State Farm. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [failure to provide adequate record on issue requires issue be resolved against appellant].) State Farm however has filled in the gaps, providing a respondent's appendix containing the necessary documents for review and which demonstrate the trial court properly granted the summary judgment motion.

B. State Farm's Separate Statement of Material Facts

State Farm was Butterfield's homeowner's insurance carrier. On January 11, 2004, Butterfield reported to her agent water had flooded the crawl space beneath her home. The agent gave Butterfield referrals to two companies—Servpro and Xtreme Clean—to remove the water. On January 12, State Farm advised Butterfield of her coverage under the policy, and the next day she advised State Farm that Servpro had begun pumping the water from her house. On January 16, Butterfield's attorney, Burton, contacted the agent who told him if Butterfield could not live in the house while under repair, State Farm would pay her additional living expenses. The agent advised Burton the policy did not cover soil remediation.

On January 26, 2004, State Farm inspected the house and ascertained the water damage was caused by wear, tear, and deterioration of a plumbing line, which was now repaired. Butterfield told the inspector soil had shifted under her house, the front yard was "'uneven,'" and the patio was separating from the house. The wood floors were badly damaged, and the insulation around the duct work beneath the floor was wet. Butterfield told the inspector her washing machine had overflowed the day before—she believed due to muddy water being pumped down the laundry room drain by Servpro. The policy did not cover plumbing damage, soil settlement, or earth movement, but it did cover damage to Butterfield's wood floors and insulation.

In early February 2004, State Farm paid Butterfield $8,298.26 to cover costs of repairs. State Farm again informed Butterfield "plumbing, land and settlement of

the foundation" and soil settlement were not covered, and she must choose a contractor to "start the repairs after confirming the house was dry." State Farm gave Butterfield the names of several potential contractors, including Emercon, and advised Butterfield (in writing) it was her responsibility to hire a contractor to make the necessary repairs and make sure all work was performed satisfactorily, and "State Farm does not warrant or guarantee the work of the contractor." State Farm advised Butterfield it could not authorize any contractor to perform work on her property, and repairs could proceed only when she hired a contractor and she authorized repairs.

On February 16, 2004, Butterfield signed a work authorization with Emercon, hiring it to proceed with water extraction and remediation repairs. In the work authorization agreement, Butterfield acknowledged Emercon was working for Butterfield, not for her insurance company, and she was responsible for any amounts not covered by her insurance.

On February 19, 2004, State Farm learned from Emercon that soil under Butterfield's foundation had been washed away and an engineering study was needed. Accordingly, State Farm paid for a structural engineering report dated March 2, 2004. The report concluded much of the foundation settlement was due to wear and tear, not water loss. Accordingly, the foundation damage was not covered.

In March 2004, State Farm reinspected the house. Butterfield had by then moved into an apartment where she remained throughout the relevant time period. There was some mold on the walls in an attached studio apartment. The inspector noted the wood floors and subfloors had been removed and there was about six inches of standing water in the crawl space beneath the house, due to recent rains. State Farm paid Butterfield $27,049.88 for additional repairs based on a revised repair estimate. In April, State Farm paid Butterfield $2,051.08 for mold remediation, $11,368.20 for dry out, $30,814.41 for packing up and restoring her belongings, and $7,098.40 for her additional living expenses, all based on Emercon's supplemental repair estimates. In May, State

Farm was advised attorney Burton no longer represented Butterfield. (In 2007, Burton began representing her again.) In June, State Farm agreed to pay for another engineering report regarding the foundation repairs. In August, it paid Butterfield another $19,123.89 for her additional living expenses.

On October 28, 2004, State Farm paid Butterfield an additional $44,265.12 for replacement costs of covered repairs based on a revised estimate prepared by Emercon. At that point, State Farm learned Butterfield decided to not hire Emercon for the repairs. No work had yet been done. State Farm again advised Butterfield it was her responsibility to hire a contractor of her choosing to undertake repairs and to make sure the work was completed satisfactorily, and it did not warrant or guarantee the work of any contractor. It paid Butterfield an additional $8,855 for personal property loss, and another $40,000 for her additional living expenses, based on Emercon's estimate the home would remain uninhabitable for another six months. The October 28, 2004, letter, which Butterfield received, specifically advised her the policy provided any legal action against State Farm "must be started within one year after the date of loss or damage[,]" and the one-year period was tolled from the time she reported the loss until the date of that letter.

State Farm did not hear from Butterfield again for seven months. On May 19, 2005, State Farm was contacted by Larry Kent, Butterfield's attorney, who asked for a reinspection of the house because repairs were "nowhere near complete." On June 14, 2005, State Farm wrote to Kent, advising him it had already paid to Butterfield "all applicable coverages" including $96,005.31 for building coverage, $39,669.41 for contents coverage, and $66,222.29 for additional living expenses through April 30, 2005. State Farm nonetheless reinspected in July, and saw that no repair work had been performed. Kent explained no contractor would begin work so long as the house was still wet and Butterfield still could not live there. An Emercon representative told State Farm the crawl space had likely remained wet until May 2005, due to rain.

State Farm confirmed there had been no additional damage to the house beyond what was covered by the Emercon estimate of $76,305.58. On August 16, 2005, State Farm so advised Kent, but it gave Butterfield another $19,500 for her additional living expenses through October 30, 2005.

In January 2006, a general contractor named Dewayne Thetford contacted State Farm contending Butterfield's house was "a total loss" from mold. State Farm told him the claim had already been paid and the file closed. Butterfield also contacted State Farm and claimed the house was covered in mold because Emercon failed to dry it out properly *two years earlier*. When asked, Butterfield could not explain why she had waited so long to contact State Farm. On February 22, 2006, State Farm again wrote Butterfield telling her the claim had not been reopened and the one-year limitations period had commenced on the date of its October 28, 2004, letter. Butterfield agreed she received this letter.

On January 16, 2007, Butterfield's current counsel, Burton (who had begun representing her again) contacted State Farm and asked about the progress of Butterfield's claim. He was advised State Farm had already paid Butterfield for all coverage and the file had been closed on February 22, 2006. Butterfield's cross-complaint was filed March 28, 2007.

State Farm had paid Butterfield a total of $225,832.01. In her deposition, Butterfield conceded she had been given money by State Farm to repair her house. She had no idea what happened to all the money, but had probably used some to pay her rent, and she had made no repairs to the property. She had no complaints about how State Farm had handled her claim.

C. Discussion

1. Late Opposition

Butterfield contends the trial court erred by refusing to consider her late-filed opposition to State Farm's summary judgment motion. She cites no authorities

and engages in no legal analysis to support her argument. Accordingly, we may treat it as waived. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 (*Kim*) [court may disregard points not adequately briefed].)

Furthermore, we defer to the trial court's ruling. Code of Civil Procedure section 437c, subdivision (b)(2), expressly requires opposition to a summary judgment motion "*shall* be served and filed not less than 14 days preceding the noticed or continued date of hearing, *unless the court for good cause orders otherwise.*" (Italics added; see also *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 624-625, disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019.) We cannot say the court abused its discretion in finding no good cause for Butterfield's late opposition. It was not until *after* the deadline for filing her opposition had passed that Butterfield sought a continuance of the hearing so she could conduct further discovery—she set the hearing on her request for one week after the date set for the hearing on the motion. Butterfield offered no explanation as to how further discovery would bear on the statute of limitations issue. The court continued the hearing on the summary judgment motion so all motions could be heard together—it did not grant Butterfield leave to file a late opposition. Butterfield then tried to serve and file her opposition just three days before the rescheduled hearing on State Farm's motion—too late for it to timely respond. (Code Civ. Proc., § 437c, subd. (b)(4) [reply due five days before hearing].) Under the circumstances, we simply cannot fault the trial court for declining to consider the late opposition.

2. Statute of Limitations

Butterfield also contends State Farm did not demonstrate it was entitled to summary judgment. We disagree. State Farm sought summary judgment on several grounds; we conclude expiration of the one-year limitations period is dispositive and need not consider the others.

The State Farm policy had a provision limiting the time within which the insured may sue to enforce the policy to "one year after the date of loss or damage[.]" Butterfield does not contend the period is unreasonable, and we note "'[s]uch a provision has long been recognized as valid in California.'" (*Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 683 (*Prudential*).)

Butterfield asserts the one-year limitations period was equitably tolled—to when she does not say. "Contractual provisions limiting time to sue are designed to prevent stale claims. Thus, absent tolling or estoppel, nothing more than the passage of time need be shown to bar the action." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2008) ¶ 6A:104, p. 6A-24, (Croskey) citing *State Farm Fire & Cas. Co. v. Sup. Ct. (Bolek)* (1989) 210 Cal.App.3d 604, 612.)

"A contractual limitations period is equitably tolled while the claim is being considered by the insurer: i.e., 'from the time the insured files a timely notice, pursuant to policy notice provisions, to the time the insurer formally denies the claim in writing.' [Citation.]" (Croskey, *supra,* [¶] 6A:121.6, p. 6A-29.) While denial must be clear and unequivocal (*Prudential*, *supra*, 51 Cal.3d at p. 678), there is no magic language. (*Migliore v. Mid-Century Ins. Co.* (2002) 97 Cal.App.4th 592, 605 [failure to use word "deny" or mention time limit for filing suit did not make denial equivocal]; *Liberty Transport, Inc. v. Harry W. Gorst Co.* (1991) 229 Cal.App.3d 417, 430-431 [insurer need not have taken "firm, unmovable positions before a denial letter can be considered unconditional"], disapproved on another point in *Adams v. Murakami* (1991) 54 Cal.3d 105, 115-116.)

Here, the uncontroverted evidence is that by October 28, 2004, State Farm believed it had paid all of Butterfield's claim and advised her in writing any legal action against State Farm "must be started within one year after the date of loss or damage[,]" from the date of that letter. It heard nothing from her for over seven months, until her then counsel, Kent, asked State Farm to reinspect the house. On June 14, 2005, State

Farm advised Butterfield's legal counsel she had already been paid "all applicable coverages" for damage to her house, its contents, and additional living expenses. State Farm reinspected in July 2005, and saw no repairs had been done but there was no additional covered damage beyond what it had already compensated Butterfield for. It so advised Kent, but agreed to pay more for Butterfield's additional living expenses. Another six months passed, with no communications from Butterfield, until January 2006, when Thetford contacted State Farm claiming the house was now "a total loss" from mold. On February 22, 2006, State Farm again wrote Butterfield telling her it had paid all coverages and the claim had not been reopened. Almost a year passed, with no inquiries from Butterfield. Then attorney Burton reentered the scene and he contacted State Farm on January 16, 2007. He was specifically told State Farm had fully paid Butterfield for all coverage and the file had been closed on February 22, 2006.

By February 22, 2006, at the latest, Butterfield was on notice that State Farm's position was that it had fully paid her for all damage to her house and no further payments would be made. At best, the one-year limitation period had been tolled until that time. Butterfield's cross-complaint was filed March 28, 2007, and was untimely. Therefore, the trial court properly granted State Farm's motion for summary judgment.

III

JUDGMENT FOR EMERCON AFTER TRIAL

Butterfield contends the judgment in favor of Emercon on its complaint and her cross-complaint is "against the evidence." We reject her contentions.

A. Standard of Review/Appellant's Burden

As with her attack on the judgment in favor of State Farm, Butterfield has utterly failed to recognize and comply with her appellate burdens. Butterfield's first opening brief was stricken because of her failure to comply with California Rules of Court. She filed a new opening brief, which did little to cure the defects. Her opening brief contains no statement of appealability (Cal. Rules of Court, rule 8.204(a)(2)(B)),

and no coherent statement of the facts (Cal. Rules of Court, rule 8.204(a)(2)(C)). The facts she does recite are not the "significant facts," as required by California Rules of Court, rule 8.204(a)(2)(C), but rather are presented in a random and disorganized fashion scattered throughout her brief, are largely unsupported by citations to the record, and are decidedly limited to only the facts that support her position.

Moreover, Butterfield does not discuss the applicable standard of review and it is apparent from her arguments she sorely misunderstands it. On appeal from a judgment following a bench trial, we do not consider whether there was sufficient evidence supporting the appellant's case; rather, our role is solely to determine whether substantial evidence supports the trial court's decision. As the appellant, Butterfield's burden on appeal is not to demonstrate the existence of evidence supporting her case, but "'to demonstrate that there is *no* substantial evidence to support the challenged findings.'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) A reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. It is the appellant's burden to identify and establish deficiencies in the evidence. (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.) This burden is a "'daunting'" one. (*Ibid.*) "'A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable,* and *show how and why it is insufficient.* [Citation.]' [Citation.] '[W]hen an appellant urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked his responsibility in this respect.'" (*Ibid.*) Thus, appellants who challenge the decision of the trial court based upon the absence of substantial evidence to support it """are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence.* Unless this is done the error is deemed waived." [Citations.]'" (*Nwosu v. Uba*

(2004) 122 Cal.App.4th 1229, 1246; *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97 [same]; *Huong Que, Inc. v. Luu, supra*, 150 Cal.App.4th at pp. 409-410 ["An appellate court will consider the sufficiency of the evidence to support a given finding only after a party tenders such an issue together with a fair summary of the evidence bearing on the challenged finding, particularly including evidence that arguably *supports* it"].)

Butterfield has clearly failed to meet her burden on appeal. Rather than setting forth all the material evidence presented by the parties, she mentions only the evidence supporting her arguments, leaving it to Emercon to set forth the evidence supporting the judgment in its favor. Because she has not set forth all the material evidence, she has not demonstrated the insufficiency of the evidence and for that reason alone we may treat her claims as waived. Furthermore, we have reviewed the record and find more than sufficient evidence to support the trial court's ruling on both Emercon's complaint and Butterfield's cross-complaint.

B. Trial Evidence/Statement of Decision

The evidence viewed most favorably to Emercon is as follows. On January 23 (after Servpro pumped the water from the crawlspace) State Farm inspected and determined the cause of the water damage was deterioration of the plumbing. Once Butterfield moved back into her house, she notified State Farm about separation of the patio and floor from the foundation. Butterfield informed State Farm about the laundry room overflow and continued wet conditions of her home. State Farm requested Servpro to come back out, remove excess water, and begin drying the house.

On February 6, Servpro notified State Farm and Butterfield the house was dried out and muddy conditions remained in the crawlspace, but it was expected to dry. State Farm gave Butterfield a list of contractors, including Emercon, for structural repairs.

On February 13, 2004, Emercon met with Butterfield at her house. It recommended using dryers and fans to attempt to dry down the soil. On February 16,

2004, Butterfield signed a work authorization allowing Emercon to enter the property, prepare a structural repair estimate, and to undertake emergency remedial work including attempting to dry the crawlspace, and removing personal belongings that were damaged or at risk of damage. Emercon determined Butterfield's artwork was showing signs of condensation under the glass and should be removed. It placed blowers in the crawlspace to help with the drying process.

On February 18, Emercon contacted State Farm to discuss the soil erosion beneath the foundation. Emercon thought it unlikely permanent structural repairs could be made on top of a compromised foundation. State Farm hired Bausley & Associates to prepare a structural engineering report. Bausley representatives observed there was still water in the crawlspace and recommended removal of the floor and subfloor to help dry the crawlspace. It observed soil and foundation subsidence—some occurring with the initial pipe break and some "caused over the life of the house."

On or about March 1, 2004, Emercon removed the floor and subfloor in the house, and placed dehumidifiers and fans throughout to dry the house and soil. Butterfield claimed Emercon also used heaters—running the house furnace for a few days. Emercon denied using heaters to attempt to dry the house. State Farm paid Butterfield her coverage amounts for this work.

In March and May 2004, the crawlspace was reportedly dry but it went through cycles of rewetting. Between March and May 2004, Butterfield paid Emercon a total of $15,188.06 on invoices Emercon sent to Butterfield, which included $1,768.78 for dehumidification services, $2,051.08 for mold abatement services, and $11,368.20 for additional dehumidification and demolition services.

Before removing the floors, Emercon packed and removed all of Butterfield's belongings and placed them in eight large storage containers at its warehouse. Although Butterfield was not happy her property was being removed, she did not refuse to have it removed. Butterfield signed each page of the 53-page inventory

sheet acknowledging the items were being removed to be cleaned and stored by Emercon. Butterfield never called the police or claimed a conversion of her property. Twice, Butterfield asked Emercon to bring her certain items out of her storage containers, and it complied. Otherwise, Butterfield never asked that her property be returned.

State Farm paid Butterfield $45,024.41 for the Emercon contents work and storage fees through September 2005, based on Emercon's invoices. Emercon billed Butterfield $43,184.41 for the contents work and monthly storage fees through September 2005, but Butterfield did not pay Emercon. Through the time of trial in June 2008, Butterfield had incurred another $33,000 in storage fees (33 months at $1,000 per month).

Butterfield agreed she had in fact received the funds from State Farm to pay for Emercon's contents work and storage fees, but stated she did not pay the charges because she never agreed to have her belongings removed. But, Butterfield conceded, she never asked to have her belongings returned as she had no where else to put them.

Emercon representative Patrick Mossman met with Butterfield at the house many times up through August 2004, to discuss the necessary structural repairs. During that time he observed the crawlspace go through cycles of wetting, drying, and rewetting. Butterfield claimed a sprinkler had been broken early on, she believed by someone from Emercon or Servpro, and the broken sprinkler was the source of the additional water intrusion. But she also testified the water to the house had been shut off, she had unplugged the broken sprinkler, and she never saw water coming from the sprinkler going into the crawlspace.

Mossman denied ever being told there was a broken sprinkler and testified the rewetting cycles were likely due to rains. There were places around the outside of the house where due to preexisting soil issues, the foundation and stucco walls were separating, which allowed rain water to get into the crawlspace beneath the house. Before structural repairs could be made, foundations repairs not covered by insurance had

to be made. State Farm paid for architectural plans, and based on those plans, Emercon prepared a bid of $21,353 for the foundation repairs. Mossman gave Butterfield the estimate, and she said she wanted to get a second opinion. Emercon prepared an estimate of $76,305.56 for the structural repairs due to the original water loss in January 2004. By September 2004, after repeatedly attempting to get Butterfield to make a decision, it became apparent to Mossman that Butterfield was not going to hire Emercon to make the foundation repairs to her property.

C. Statement of Decision

In its statement of decision, the trial court found in Emercon's favor on its complaint. It found Butterfield owed Emercon $76,184.41 for storing her personal belongings. It based this determination on the facts that Butterfield signed the inventory lists, did not protest the pack out or removal of her belongings and never contacted Emercon for return of her belongings, and Emercon incurred substantial costs to pack, remove, clean, and store Butterfield's belongings. Butterfield signed the work authorization, acknowledging her responsibility to pay for the services. The court found Emercon's charges for its services and the continued storage of Butterfield's belongings was reasonable.

As to Butterfield's cross complaint against Emercon for negligence, the court also ruled in Emercon's favor. It found the only agreement Butterfield had with Emercon was the work authorization for the initial emergency remediation work and contents work. Her failure to make a decision regarding additional (foundation) repairs prevented Emercon from doing anything more on the property. The court found Emercon acted reasonably toward Butterfield because it was Butterfield's responsibility to hire a contractor to make subsequent repairs. The court found Emercon's conduct had no relationship to the presence of mold in Butterfield's home. Emercon performed the emergency repairs it was hired to do. There was no evidence subsequent water intrusions were the result of anything Emercon did—there was no evidence Emercon broke a

sprinkler as suggested by Butterfield or that a broken sprinkler caused the subsequent water loss. There was no basis for Emercon to perform services without Butterfield's authorization; further repairs could not be made without achieving a certain level of dryness in the foundation and footings; Butterfield would not authorize Emercon to repair the foundation. It found Emercon was not an employee or agent of State Farm—it was an independent contractor.

D. Discussion

1. Judgment on Emercon's Complaint

Butterfield's attack on the judgment in favor of Emercon is a largely disjointed ramble that shifts between her complaints about the ruling on Emercon's complaint and the ruling on her cross-complaint. We have endeavored to briefly address each of her points of error, none of which have merit.

Butterfield argues the court's reasoning in its statement of decision has no "force" because State Farm "thrust" Emercon on her, and Emercon was nothing more than "a trespasser on her land, and converter of her goods." Trespass and conversion were not theories raised below, and may not be raised for the first time on appeal. (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 983.) And to the extent Butterfield is challenging the sufficiency of the court's statement of decision, her failure to raise any objections below waives any such claim. (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 140-141.)

The gist of Butterfield's next attack seems to be State Farm hired Emercon, not she. Thus, she argues Emercon must look to State Farm for payment for its contents work and the storage of Butterfield's belongings. Furthermore, she asserts the damage to her house was obviously caused by Emercon and therefore, she should not be required to pay Emercon for any of its services. Butterfield steadfastly ignores the court's express findings Emercon was not hired by State Farm, was not acting as State Farm's agent, properly performed all work it was authorized to do in work orders signed by Butterfield,

and there was no evidence supporting any claim Emercon was negligent. She also ignores that State Farm paid to her all her policy coverages for the contents work based on Emercon's estimate for that work.

In short, Butterfield's challenge is nothing more than rearguing the facts she believes are favorable to her, ignoring the facts that support the ruling, and hoping for a better result. This she may not do.

Emercon recovered damages on theories of breach of contract and quantum meruit. The requisite elements of quantum meruit are (1) the plaintiff acted pursuant to an express or implied request for services by the defendant, and (2) the services rendered benefited the defendant. (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 248.) Emercon established both elements for recovery. Butterfield signed a work authorization allowing Emercon to conduct emergency repairs acknowledging her responsibility to pay for the services. Emercon removed Butterfield's art work to prevent moisture damage, and removed her other belongings so the floor and subfloor could be removed for dry out. Butterfield signed the inventory lists, did not protest the pack out or removal of her belongings, and never demanded Emercon return her belongings. There was substantial evidence Emercon's charges for its services and storage of Butterfield's belongings was reasonable.

2. Judgment on Butterfield's Cross-Complaint

Butterfield argues the judgment in favor of Emercon on her cross-complaint for negligence is also "against the evidence." Her argument comprises almost 20 pages in which she does nothing more than reargue the evidence she presented below. There are virtually no citations to legal authority, no reference to any of the elements of negligence, and no explanation as to how she demonstrated every element to be present as a matter of law so as to require a judgment in her favor. Butterfield discusses none of the evidence favorable to Emercon. She does not so much as mention the standard of review applicable when the sufficiency of the evidence is challenged. For this reason

alone we treat her arguments as waived—she has utterly failed in her appellate burden to demonstrate error.

Butterfield's case is premised on her assertion that negligence of Emercon—either by improperly drying out her house in the first place or in failing to secure the property from further water intrusions after the initial burst pipe—caused her house to become uninhabitable due to mold growth. To prevail on her negligence claim, Butterfield had to prove Emercon owed her a legal duty, it breached the duty, and the breach was a proximate or legal cause of her injury. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.)

First, Butterfield failed to establish Emercon breached a duty owed to her. Prior to trial, due to her failure to designate an expert on the subject, Butterfield was precluded from introducing any evidence on the standard of care—she does not challenge that ruling.

Butterfield also looses on causation. "Causation is generally a question of fact . . . unless reasonable minds could not dispute the absence of causation. [Citation.]" (*Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 666.) Butterfield fails to demonstrate how she established causation as a matter of law. "A plaintiff cannot recover damages based upon speculation or even a mere possibility that the wrongful conduct of the defendant caused the harm. [Citations.] Evidence of causation must rise to the level of a reasonable probability based upon competent testimony. [Citations.] 'A possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action.' [Citation.] The defendant's conduct is not the cause in fact of harm '"where the evidence indicates that there is less than a probability, i.e., a 50-50 possibility or a mere chance,"' that the harm would have ensued. [Citations.]" (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 133.)

Butterfield presented no evidence on causation. At trial she was precluded from introducing any expert witnesses because she failed to properly designate them. Thus, there was no expert testimony the current alleged condition of Butterfield's house was caused by anything Emercon did or did not do.

In passing, Butterfield asserts her undesignated experts should have been permitted to testify as percipient witnesses. Her suggestion is unsupported by any reasoned legal analysis or citations to authority, and we treat it as waived. (*Kim, supra*, 17 Cal.App.4th at p. 979 [appellate contention is forfeited by failure to present legal analysis/authority].) Furthermore, she does not suggest what evidence on the element of causation the experts would have offered.

In the last paragraph of Butterfield's discussion of the judgment on Emercon's complaint to recover the costs of moving and storing her belongings, she makes the statement, "Emercon's negligence is a clear case of res ipsa loquitur[,]" followed by a statement of the requisites for establishing causation by res ipsa loquitur. Although Butterfield does not follow the statement with any kind of reasoned analysis, we infer from it she contends the court should have found causation on a res ipsa loquitur theory, an argument she did raise below.

The doctrine of res ipsa loquitur represents a rebuttable presumption of negligence, in cases in which "(1) The accident must be caused by an agency or instrumentality under the exclusive control of the defendant; (2) the accident must be of a type that ordinarily does not happen unless someone is negligent; (3) it must not have been due to any voluntary act or contributory fault of the plaintiff." (1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof, § 114, p. 250.)

Whether the conditions for applying res ipsa loquitur exist is a question of fact. (*Seneris v. Haas* (1955) 45 Cal.2d 811, 826.) Substantial evidence supports the trial court's implicit finding against Butterfield on this issue. Butterfield's house was not under Emercon's exclusive control, thus it cannot be said the subsequent water intrusions

were necessarily due to anything Emercon did or did not do. The court found the only agreement Butterfield had with Emercon was the work authorization for the initial emergency remediation work and the contents removal and storage work, which it completed. There was evidence the permanent structural repairs Emercon submitted an estimate for could not be completed until the foundation was repaired, but Butterfield would not authorize Emercon (or anyone else) to go forward with those repairs. In short, Butterfield has not demonstrated the judgment against her on her cross-complaint for negligence is unsupported by the evidence.

IV

MOTION FOR SANCTIONS

Emercon has filed a motion to impose sanctions against Butterfield and her attorney on the grounds the appeal is frivolous and her opening brief contains egregious violations of the California Rules of Court. We agree monetary sanctions are warranted in this case.

We begin with procedural background. In her designation of the record on appeal, Butterfield specifically stated she was proceeding *without* a record of the oral proceedings. Her attorney, Burton, signed and initialed the boxes on the form stating he understood without a reporter's transcript Butterfield could not rely on anything said at trial, and he crossed out and initialed sections where he had previously filled in the dates for which reporter's transcripts were otherwise available. Accordingly, Emercon began preparing for this appeal on the assumption there would be no reporter's transcript.

In March 2009, Butterfield filed her opening brief. Her brief relied heavily on the oral proceedings and contained repeated citations to a reporter's transcript of the trial, although none had ever been designated or filed. Additionally, Butterfield's brief was in violation of court rules as it contained none of the following: table of contents, table of authorities, statement of appealability, statement of facts, statement of the

applicable standard of review, or a statement of the issues on appeal. (Cal. Rules of Court, rule 8.204(a)(1).)

On April 10, 2009, Emercon filed a motion to dismiss Butterfield's appeal, or in the alternative strike her opening brief, and a motion to award it $23,320 in monetary sanctions (its total attorney fees at that point). Butterfield responded by conceding her opening brief contained a few "inadvertent errors" and offering to file a corrected brief. Additionally, her counsel, Burton, explained he had always intended to rely on the reporter's transcript, but planned on submitting the copy he already had to save money, rather than designate it as part of the record on appeal. Butterfield also filed a motion to augment the record with the reporter's transcript.

On May 8, 2009, we granted Butterfield's motion to augment the record with the reporter's transcript, denied Emercon's motion to dismiss the appeal, and ordered Butterfield's original opening brief stricken. We ordered that Emercon's motion for monetary sanctions would be considered in conjunction with the appeal.

On June 10, 2009, Butterfield filed a new opening brief. We have already discussed above the continued deficiencies in that brief. The opening brief still contains no coherent statement of facts and no statement of appealability. Butterfield discusses only the evidence supporting her position, cites little or no law in support of her contentions, and makes no mention of the applicable standards of review. Although Butterfield's brief now contains a table of contents and purports to state her arguments under separate headings, her arguments are completely intertwined with one another. (Cal. Rules of Court, rule 8.204(a)(1) & (2).)

On October 9, 2009, after briefing was completed, Emercon filed an amended motion for sanctions on appeal on the same grounds stated earlier, but now seeking a sanction award of $62,316—its total attorney fees associated with this appeal.

We agree with Emercon that repeated violation of appellate rules justifies imposition of sanctions against Butterfield's attorney in this case. Emercon has set forth

in detail (and we have already discussed throughout this opinion) how Butterfield violated rules of court by failing to adequately cite to the record to support factual matters; engaging in ad hominem attacks on Emercon, State Farm, and others; failing to fairly summarize the facts; and failing to discuss the applicable standards of appellate review. "Sanctions are warranted for a party's unreasonable violations of the rules of appellate procedure. [Citations.]" (*Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 165 (*Evans*); Cal. Rules of Court, rule 8.276(a)(4).)

The violations of the rules by Butterfield's attorney are flagrant. We begin by noting the trial court repeatedly sanctioned Butterfield and Burton for continuing discovery abuses: September 28, 2007, $1,995; December 21, 2007, $1,050; February 1, 2008, $1,015; May 16, 2008, $1,500. The trial court rejected Butterfield's opposition to State Farm's motion for summary judgment because it was untimely, and Burton then tried to take advantage of a continuance of the hearing to "slip" a late opposition in without obtaining leave of court, in what the trial court noted was a "part of a pattern by [Burton] to disregard the rules." At trial against Emercon, Butterfield was precluded from introducing any evidence on standard of care, or from calling any expert witnesses because she had not complied with expert witness exchange demands.

On appeal, the misconduct continues. The court rules specifically require that an appellant *must* designate a reporter's transcript if he or she intends to raise any issues that require consideration of the oral proceedings. (Cal. Rules of Court, rule 8.120(b).) Burton purposely did not designate the reporter's transcript as part of the record on appeal, specifically acknowledging that by not doing so Butterfield could not rely on anything said at trial. (Cal. Rules of Court, rule 8.130.) He then filed an appellant's opening brief that relied heavily on an unfiled reporter's transcript. When called on it by Emercon, Burton sought augmentation of the record, explaining it had always been his intention to rely on the reporter's transcript, but he had planned on not designating it thinking he could just send the appellate court the copy he already had.

(He could not have included it in the appellant's appendix because the rules specifically preclude a party from including a reporter's transcript in the appellant's appendix (Cal. Rules of Court, rule 8.124(b)(2)(B).)

The appellant's appendix prepared by Burton is also woefully inadequate. Although required by the rules to include "[a]ny item . . . that is necessary for proper consideration of the issues, including . . . any item that the appellant should reasonably assume the respondent will rely on[,]" (Cal. Rules of Court, rule 8.124(b)(1)(B)), Butterfield's appellant's appendix omits many such items—notably, it omits State Farm's summary judgment moving papers (including only her rejected opposition), omits any of Emercon's pleadings, omits trial exhibits favoring Emercon, and contains an incomplete statement of decision (it includes the statement, but not the hearing transcript the trial court specifically stated was attached to and incorporated into the written statement of decision). We have already discussed the myriad inadequacies in Butterfield's revised original opening brief.

In *Evans, supra,* 134 Cal.App.4th at page 165, this court imposed substantial sanctions against appellant and his attorney for flagrant violation of appellate rules. Sanctions were also supported on the alternative grounds the appeal was frivolous. Among the transgressions were that "issues [were] haphazardly splashed throughout the brief," making the brief "'repetitive, tangled and, at times, utterly incoherent[,]'" requiring the respondents and this court "to spend an inordinate amount of time deciphering the claims . . . ." (*Id.* at p. 166.) "'[A]n opening brief is not an appropriate vehicle for an attorney to "vent his spleen" after losing . . . .' [Citation.]" (*Ibid.*) The opening brief "failed to 'provide a summary of the significant facts limited to matters in the record[,]'" and lacked or contained inadequate citations to the record, and the appellant's appendix was inadequate. (*Id.* at p. 167) We noted, "[Appellants'] passing apologies for 'non-substantive "infractions" of this [c]ourt's rule[s]' are really a failure to recognize the overall scheme of the Rules of Court and the extent of their violations.

Especially in light of their continuing disobedience, this disingenuous contriteness does not relieve them from an award of sanctions." (*Ibid.* See also *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29 [sanctions appropriate where appellant violated court rules "with abandon"]; see also *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 884-885 [sanctions imposed "to emphasize the substantial additional time required to craft an opinion when the court rules are ignored as flagrantly as they are herein. The public fisc is limited, and justices and support staff must carefully monitor and utilize their resources."].)

We do not impose sanctions lightly, but conclude sanctions are appropriate in this case due to the many violations of court rules. We do not, however, agree with Emercon that those sanctions should be in the amount of *all* attorney fees it has expended on this appeal—an amount in excess of $62,000. Rather, we believe the sanctions should be in an amount reflective of the additional burdens imposed on Emercon due to Burton's violations of court rules and that will discourage similar conduct in the future. (*Evans, supra,* 134 Cal.App.4th at p. 168.) We note four separate trial court sanction orders totaling over $5,000 have apparently not gotten counsel's attention.

We invited Emercon's counsel to file supplemental declarations detailing the attorney fees incurred by Emercon related to Burton's repeated violations of appellate rules as distinguished from attorney fees it otherwise would have incurred in the normal course of the appeal. Burton was permitted to file opposition to those declarations. Emercon has demonstrated it incurred an additional $25,400 in attorney fees in responding to frivolous filings by Burton, dealing with Burton's reporter's transcript shenanigans (i.e., specifically declining to designate a reporter's transcript but then filing an opening brief making repeated reference to the reporter's transcript), and responding to a woefully inadequate appellant's opening brief. Accordingly, we conclude a sanction of $25,000 against Butterfield's attorney, Thomas M. Burton payable to Emercon, is

appropriate in this case to compensate Emercon for additional burdens imposed on it and to deter similar conduct in the future.

DISPOSITION

The judgments are affirmed. Respondents State Farm and Emercon are awarded their costs on appeal. Thomas M. Burton, counsel for Carleen Butterfield, is ordered to pay sanctions of $25,000 to respondent Emercon. These sanctions are to be paid by Burton individually, without contribution or reimbursement by Butterfield. The sanctions are payable within 30 days of the filing of the remittitur. Burton shall provide this court with an affidavit stating he has not and will not bill his client for any portion of the sanctions. Burton is also ordered to report the sanctions to the State Bar. (Bus. & Prof. Code, § 6068, subd. (o)(3).) The clerk of this court is directed to forward a copy of this opinion to the State Bar. (Bus. & Prof. Code, § 6086.7, subd. (c).)

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.